September 12, 2001 (8)

FILED
SEP 12 2001
CLERK

No. 00-1187

IN THE
Supreme Court of the United States

DAVID R. MCKUNE, Warden,
CHARLES SIMMONS, Secretary,
KANSAS DEPARTMENT OF CORRECTIONS,
Petitioners,

v.

ROBERT G. LILE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF

TIMOTHY G. MADDEN
Chief Legal Counsel
Kansas Department of Corrections
900 S.W. Jackson
Topeka, Kansas 66612-1284
(785) 296-3317

CARLA J. STOVALL
Attorney General
STEPHEN R. MCALLISTER
State Solicitor
(Counsel of Record)
JARED S. MAAG
120 S.W. 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597
(785) 296-2215

12 pp

QUESTION PRESENTED

Whether the revocation of correctional institution privileges violates the Fifth Amendment's privilege against self-incrimination where the inmate has no liberty interest in the lost privileges and such revocation is based upon the inmate's failure to accept responsibility for his crimes as part of a sex offender treatment program?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. Kansas Neither Concedes Nor Acknowledges That Respondent Would Be "Punished" For Invoking His Fifth Amendment Rights When He Refuses To Participate In The Sexual Abuse Treatment Program 2

II. Only A Liberty Interest Analysis Can Provide Prison Administrators With Clear Guidance 3

III. The Prison Conditions At Issue Here Do Not Amount To Unconstitutional Compulsion 5

IV. Respondent's Proposed Analysis Would Give Prison Administrators The Ironic Incentive To Place All Sex Offenders—If Indeed Not All Inmate— Maximum Security When They Enter Prison 6

CONCLUSION 8

TABLE OF AUTHORITIES

FEDERAL CASES

Baxter v. Palmigiano,
425 U.S. 308 (1976) 5
Department of Revenue v. Kurth Ranch,
511 U.S. 767 (1994) 6
Kansas v. Hendricks,
521 U.S. 346 (1997) 3
Minnesota v. Murphy,
465 U.S. 420 (1984) 5
Ohio Adult Parole Auth. v. Woodard,
523 U.S. 272 (1998) 5
Sandin v. Conner,
515 U.S. 472 (1995) 3
Turner v. Safley,
482 U.S. 78 (1987) 4

ARGUMENT

Respondent essentially offers the Court two "solutions" in this case: (1) require Kansas to immunize all inmates who participate in the Sexual Abuse Treatment Program (SATP) or (2) classify *all* inmates as maximum security inmates and give them the least amount of prison privileges possible, making them *earn* anything better. Resp. Br. 7.

The first "solution"—which the Tenth Circuit endorsed in this case—puts the cart before the horse, by solving a problem that does not exist. If there is no unconstitutional "compulsion" to begin with, then there is no constitutional reason why Kansas should have to immunize inmates' statements.

The second "solution" is an ironic suggestion that, although perhaps theoretically possible to implement, would actually work to the detriment of thousands of inmates in this country who would not otherwise be placed in maximum security conditions. Thus, this "solution" is probably both counterproductive and fanciful, at best.

With all due respect, the best "solution" is to permit the States the ability to require violent sex offenders such as respondent to make some difficult choices that, in the long run, will benefit the offenders themselves and society. Without strong incentives to participate in prison treatment programs in a meaningful way, many inmates will refuse to do so, as respondent has amply demonstrated. Permitting inmates to participate only on their own terms—which will undermine a key component of the treatment—is no "solution." This Court should conclude that the Kansas SATP is constitutional.

II. Kansas Neither Concedes Nor Acknowledges That Respondent Would Be "Punished" For Invoking His Fifth Amendment Rights When He Refuses To Participate In The Sexual Abuse Treatment Program

Contrary to suggestions made by respondent, Kansas has neither conceded nor acknowledged that respondent would be "punished" for invocation of his Fifth Amendment rights. Rather, he would suffer a loss of *privileges*—to which he has no entitlement and in which he has no liberty interest—for refusing to comply with the requirements of the Sexual Abuse Treatment Program (SATP). Refusing to participate in a meaningful way in the Kansas SATP is a *choice* that respondent indeed can make, but he has no constitutional right to insist that such a choice have absolutely no consequences for him.

This proposition is poignantly illustrated by an exchange between the warden of Lansing prison, David R. McKune, and one of respondent's attorneys, during McKune's deposition:

> Q. Okay. And you've talked about a person — an inmate's decision to enter into the SATP program and other programs as their choice, is that correct?
>
> A. Yes.
>
> Q. You refer to it as a choice?
>
> A. Yes.
>
> Q. All right. And that they must deal with the consequences if they refuse not to choose to enter the program.
>
> A. Correct.
>
> Q. And that's how you see the incentive level system, correct?
>
> A. Correct.

> Q. You'd admit, then, that there's a price that they have to pay for making that choice, wouldn't you?
>
> A. There are consequences of that choice, yes.
>
> Q. Okay. So it's not a completely free and unfettered choice, is it?
>
> A. Are there any?
>
> Q. But —
>
> A. I mean, there's consequences to every choice you make in life, and there are consequences to that choice as well.

J.A. 81-82.

Moreover, neither court below made a factual finding that respondent would be "punished" for refusing to participate in the SATP. Rather, the question whether particular circumstances amount to "punishment" for constitutional purposes is a question of law subject to *de novo* review, as in *Kansas v. Hendricks*, 521 U.S. 346 (1997).

Selective quoting of snippets of the record taken out of context does not establish that respondent would be "punished" for invoking his Fifth Amendment rights when he refuses to participate in the Kansas SATP. Rather, Kansas respectfully urges the Court to consider the entirety of the evidence in the Joint Appendix, as well as the relevant "compulsion" cases discussed in Kansas's opening brief. Doing so will demonstrate that respondent is not being "compelled" to incriminate himself, and thus he has no valid Fifth Amendment claim.

II. Only A Liberty Interest Analysis Can Provide Prison Administrators With Clear Guidance

Respondent concedes, as he must, that only a liberty interest analysis—as in *Sandin v. Conner*, 515 U.S. 472

(1995)—will give prison administrators clear guidance. Also, respondent concedes, again as he must, that prison inmates such as himself have no constitutional entitlement to any particular security or housing classification.

Nonetheless, respondent urges on this Court an indeterminate balancing of interests that will provide no one guidance and that will ensure plenty of litigation by prison inmates challenging various aspect of the numerous prison programs that exist in the state and federal prison systems.

Moreover, respondent also recognizes that the application of the *Turner v. Safley*, 482 U.S. 78 (1987) balancing test to claims other than those involving First Amendment interests has never been made clear by this Court. Respondent, however, urges formulaic application of the four *Turner* factors—like the Tenth Circuit's analysis in this respect—focusing heavily on the question whether respondent has any alternative means of exercising his Fifth Amendment rights.

But this demonstrates the potential impropriety of the *Turner* factors outside the First Amendment context. In a Fifth Amendment case, it is impossible to see how the affected inmate would *ever* have an alternative way of exercising his rights. He either speaks or he invokes the privilege; there is nothing else he can do.

The Tenth Circuit and respondent both argue that all the State needs to do in such situations is immunize the inmate. But there are reasons the State might not wish to do so, and there is no constitutional reason why the State must. Indeed, using the *Turner* factors as both the Tenth Circuit and respondent do in this case, a Fifth Amendment claim by an inmate will *always* compel the State to immunize the inmate's statements, because there is no alternative means for the inmate to exercise his rights.

This result is contrary to the fundamental purpose of the *Turner* analysis—requiring federal courts to give deference to the reasonable judgments of federal and state prison administrators in managing extremely difficult inmate populations. It also puts the cart before the horse in the Fifth Amendment context, because a court may—as the Tenth Circuit did here—essentially conclude that the State must immunize inmates' statements without ever really grappling with the preliminary Fifth Amendment issue, which is whether an inmate is being subjected to unconstitutional "compulsion." Without "compulsion," there simply is no Fifth Amendment claim, and the State cannot be constitutionally required to immunize statements.

III. The Prison Conditions At Issue Here Do Not Amount To Unconstitutional Compulsion

The parties do not disagree in this case on the privileges that would be withheld from respondent for his refusal to participate in the SATP. Rather, we disagree as to the legal significance of those withheld privileges. With all due respect, Kansas relies principally on the discussion in its opening brief to refute respondent's attempted characterization of cases such as *Baxter v. Palmigiano*, 425 U.S. 308 (1976), *Minnesota v. Murphy*, 465 U.S. 420 (1984), and *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), as somehow involving *less* significant consequences than in this case. Indeed, in all three cases, the person invoking his Fifth Amendment privilege faced significantly greater consequences than the loss of a personal television.

Moreover, respondent does not even begin to address the complex and potentially suggestive history of the privilege against self-incrimination. Instead, respondent basically asserts that the Fifth Amendment prevents more than just confessions obtained by torture—a point that Kansas will obviously concede—but adds virtually no further explication. Again, Kansas relies principally on the historical discussion in

its opening brief to suggest that loss of a personal television simply does not fall within the protections of the privilege.

Lastly, respondent suggests that "[t]o Mr. Lile, the sanctions threatened by the State make the assertion of his privilege costly." Resp. Br. 31. But respondent's personal opinion is not the constitutional measure of the Fifth Amendment's scope. Indeed, this Court previously and clearly has rejected any notion that what amounts to "punishment" for constitutional purposes is to be measured by the *subjective beliefs* of the person affected. "[W]hether a sanction constitutes punishment is not determined from the defendant's perspective." *Department of Revenue v. Kurth Ranch,* 511 U.S. 767, 777 n.14 (1994).

IV. Respondent's Proposed Analysis Would Give Prison Administrators The Ironic Incentive To Place All Sex Offenders—If Indeed Not All Inmates—In Maximum Security When They Enter Prison

Kansas finds it more than a trifle ironic that respondent suggests that Kansas avoid potential Fifth Amendment problems by (1) classifying *all* inmates as maximum security when they first enter prison, (2) giving them the minimum conditions and privileges that are constitutionally acceptable, and (3) making them earn any additional or better privileges or conditions. Resp. Br. 7. Although perhaps theoretically possible, such a "solution" would be dramatically different from longstanding, established prison management practices and principles. Such a "solution" would also work to the detriment of tens of thousands of inmates who would not otherwise be placed in the maximum security category or in maximum security conditions.

Thus, in the end, respondent's suggested "solutions" are not really solutions at all. Instead, they illustrate just how far respondent (and the Tenth Circuit below) have to strain to justify invalidating the laudable Kansas SATP. Respondent

does not challenge the fact that acceptance of responsibility is a key component of managing a successful, rehabilitative, sex offender treatment program.

Nonetheless, respondent ultimately seeks "acceptance *without* responsibility," a result that our Constitution does not require.

CONCLUSION

Kansas respectfully requests that the Court reverse the decision of the Tenth Circuit, and hold that the acceptance of responsibility requirement of the Kansas sexual abuse treatment program is constitutional.

Respectfully submitted,

TIMOTHY G. MADDEN
Chief Legal Counsel
Kansas Department of
Corrections
900 S.W. Jackson
Topeka, Kansas 66612-1284
(785) 296-3317

CARLA J. STOVALL
Attorney General
STEPHEN R. MCALLISTER
State Solicitor
(Counsel of Record)
JARED S. MAAG
120 S.W. 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597
(785) 296-2215

September 2001